The Madras Law Journal.

Vol. XVIII.] OCTOBER, 1908. [Part XX.

SECTION 30 OF THE INDIAN EVIDENCE ACT.

Next to the Indian Penal Code, the Indian Evidence Act may be said to be the most successful attempt at codification by the Indian Legislature It cannot be said to have been inartistically or clumsily drawn up as many of the Indian Statutes are. Nevertheless, different Sections of the Act have given rise to a considerable crop of decisions, though these cannot be ascribed to any fault in the drafting. Chief among these is S. 30 and it may be useful to look at the language of the section to see what its exact scope is before one considers the several decisions bearing upon the section. S. 30 runs thus: "When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

According to the section, a confession made by one of several persons tried jointly for the same offence affecting himself and the others when proved may be taken into consideration, *first*, as against the person making the confession and, *secondly*, as against the other person or persons. We are not here considering all the points arising in connection with S. 30, but only the question whether the confession allowed to be taken into consideration against others is against such latter "evidence" within the meaning of the Act.

For this purpose it is necessary to consider what the scheme of the Act is as regards statements made by third persons or persons not before the Court, or statements made by persons who do not make them as witnesses. According to the English Law it is clear that such statements are not admissible, *the principle being*

res inter alios acta, etc. The question for consideration is whether this principle has been recognized in the Evidence Act, and if so to what extent. According to the definition of "admission" in the Act it may be both self-serving and self-harming, *i. e.*, it may be a statement suggesting an inference in favor of the party making it or a statement suggesting an inference against the party making it. Of course the party making it must be a person coming under Ss. 18 to 20. It is a principle of the English Law that self-serving statements are not admissible in evidence unless they form part of the *res gestae.* But when we turn to S. 21 of the Act we do not find an absolute rule of exclusion as regards these self-serving admissions We draw special attention to the language of S. 21 which has a very material bearing in this connection. S. 21 enacts that "admissions are *relevant*, and may be proved as against the person who makes them or his representative in interest; but they cannot be proved by or on behalf of the person who makes them, or by his representative in interest, except in the following cases."

Far from the above section (S. 21) declaring the absolute inadmissibility of self-serving statements, the section enacts as a general rule that admissions are relevant. Hence according to the Act, as we understand it, statements whether self-serving or self-harming, amounting to admissions are relevant. Of course all *relevant* evidence may not be *admissible* and may not be capable of being proved. The section, therefore, goes on to state that the admissions declared relevant may be proved as against the person making them, so that self-harming statements are both *relevant* and *admissible* as against the person making them. But as regards self-serving statements, *viz.*, statements which suggest an inference in favor of the party making them, although they are relevant they cannot be proved by him or on his behalf except in the three cases mentioned in the section. We are here construing the expression " as against the person making them or his representative in interest" used in S. 21 as qualifying the expression immediately preceding it, *viz.*, " may be proved" and not as qualifying also the expression "are relevant." In other words the expression "as against the person making it" in our view only qualifies "may be proved" and not the whole expression "are relevant and may be proved." This view receives support from the fact that in the latter clause dealing with proof by or on

behalf of the party making them, relevancy is not referred to at all. The semicolon usually given as connecting these two clauses in para 1 must be rejected. If the expression "as against the person who makes them" qualifies "relevant" also, there is no necessity for stating in the later clause that admissions cannot be proved by or on behalf of the person who makes them, etc. It is because admissions have been generally declared to be relevant in the beginning of the section that it becomes necessary to enact in the later clause that such admissions, though relevant, cannot be proved by or on behalf of the party making them. In taking this view it is not necessary to adopt merely a grammatical or literal interpretation of the section. That is the only natural construction of the language employed if we bear in mind the wide scope of the definition of admissions in the Act.

Leaving out self-harming and self-serving statements, the proof of which is expressly dealt with in S. 21, there is yet a large class of statements which are neither self-harming nor self-serving, but which yet suggest an inference as to a fact in issue or relevant fact not in favor of the party making them nor against him, but in favor of or against another party. These are admissions according to S. 17, and they are relevant according to S. 21, but the question is whether they can be proved in favor of or against the other party. According to the English Law the question admits of but one answer. They are *res inter alios acta* and are inadmissible in evidence, but according to the Act such an answer is not possible. At any rate it cannot be said with the same certainty that they are inadmissible. In fact if one reads S. 21 of the Evidence Act with S. 30, one is almost pressed to the conclusion that such statements are not merely relevant but also may be proved. Taking S. 21 by itself such statements are relevant, but the section does not enact that they cannot be proved by or on behalf of or against the third party. Of course, the section declares first that admissions may be proved as against the person who makes them, etc. This does not apply as the statement in question is sought to be proved as against the person who does not make it. The section then declares that admissions cannot be proved by or on behalf of the person who makes them. This also does not apply as the statements in question are sought to be proved not by or on behalf of the party *making* them but by or on behalf of the party *not making* them. If our construction

of S. 21 is correct, *viz.*, that admissions as defined in the Act are generally declared to be relevant, and if the statements we are considering do not come within the rule of exclusion as to proof stated in that section we must take it that they can be proved for the purpose in question unless there is some other principle of exclusion recognised in the Act which will make them inadmissible in evidence. It may be admitted, as already stated, that all relevant facts are not admissible, but a fact declared to be relevant can only be made inadmissible by positive law or enactment or by some principles recognized by positive law. It is because of such principles or of such law that communications between husband and wife, barrister and client, although perfectly relevant, are not admissible in evidence. But nothing short of positive enactment or the recognition of principles enunciated by positive law can make a fact declared to be relevant inadmissible. Further, S. 5 of the Act expressly enacts that evidence may be given of the existence or non-existence of every fact in issue and of such other facts as are thereinafter declared to be relevant. The statements in question being declared to be relevant by S. 21, evidence of them may be given under S. 5.

Turning to S. 30 of the Evidence Act we find that our view of S. 21 is amply corroborated. According to the former section a confession made by one of several persons tried jointly for the same offence affecting himself and the other co-accused may be taken into consideration both as against the person making it as well as against the others. In order that this confession may be taken into consideration the section enacts that it has to be proved, and this proof must be in accordance with the Evidence Act. If it is proved, then according to S. 5 it is at any rate a relevant fact. The fact that in the section it is enacted that the Court may take such confession into consideration does not justify the inference that the Legislature intends to draw a distinction between "taking into consideration" and "being evidence," because *even as against the person making it* the section states that it may be taken into consideration. It cannot be contended that as against the person making it, it is no evidence. The section only declares what a Judge does in every case, *viz.*, that be may take relevant evidence into consideration. Of course a Court takes into consideration not merely *evidence* strictly within the Act but also *other matters* which are not *evidence* as defined in the Act (*vide* definition

of "proved" in S. 3). The section, however, does not declare that the confession which may be taken into consideration under that section is not evidence as defined in the Act.

The decisions of Indian Courts on the construction of this section of the Evidence Act are, as usual, conflicting. In many of these all the different sections of the Act bearing upon the matter are not considered. But before considering the decisions under the Act it may be useful to consider the law prevailing before the Act, although in construing a clear provision of the Act which purports to codify the whole law of evidence, the previous history of the law cannot be looked into except in a case of ambiguity. In *Queen* v. *Kalichurn*,[1] it was held that the confession of an accused person was only evidence against himself and was no evidence against the accomplices whom he implicated. The same principle was stated by *Hobhouse* J. in *Queen* v. *Bassiruddi*[2] where it was held that the admission of an accused could not be taken to be corroborative evidence or any evidence at all against anybody other than himself. The confession of a co-prisoner was not even regarded as corroborative evidence in cases where such corroborative evidence was necessary under the law—see *The Queen* v. *Durbaroo Das Sirdar*[3]. In *The Queen* v. *Sadhu Mundal*[4] the Judges (*Phear* and *Morris* JJ.) observed "that until the passing of the Indian Evidence Act such dangerous material (as was contained in S. 30) could not be used as evidence against the accused person." But, as already stated by us, this signifies nothing.

Dealing with S. 30 of the Indian Evidence Act, *Phear* and *Morris* JJ. observed in *Queen* v. *Naga*[5]: "This Court has already had occasion in more than one case to point out that confessions which are made use of under S. 30 of the Evidence Act, in the first place can only be used so far as they make the confessing prisoner guilty of the offence for which all are being tried, and secondly, cannot stand higher than the evidence of an accomplice." We are not at present concerned with the second part of the principle herein laid down. We have only to see whether the confessions are *evidence* as against the co-prisoners and whether they bear any comparison to the evidence of an accomplice. The

1. (1866) 6 W. R. Cr. 84.
2. (1867) 8 W. R. Cr. 35.
3. (1870) 13 W. R. Cr. 14.
4. (1874) 21 W. R. Cr. 69 (71).
5. (1875) 23 W. R. Cr. 24.

question whether the confessions cannot stand higher than the evidence of an accomplice will be dealt with later on. All that we are at present concerned with is whether it is evidence within the meaning of the Act. With reference to this question the same learned Judges observed later on in the same case: "And when we look at the words of S. 30 itself we find that the Legislature avoids saying that confessions of this sort are evidence or may be used as evidence as against persons other than those who made them; it says merely, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession. It is, we conceive, generally unsafe to use materials of this character against persons under trial without carefully bearing in mind its special infirmity of character."

The learned Judges in the above case lay stress upon the expression "take into consideration" as distinguished from "evidence." No doubt, in S. 30 the Legislature does not say that confessions are evidence as against persons other than those who make them, but at the same time it is to be observed the learned Judges fail to take into consideration the other sections of the Act having a material bearing upon this question which have been already considered, and, as we have tried to shew, the use of the expression "take into consideration" does not in any way militate against the view that such confessions are evidence.

In *Queen* v. *Sadhu Mandal*[1], it was observed: "Until the passing of the Indian Evidence Act such dangerous material as this could not be used as evidence against the accused person, and even by that Act the Legislature only bestowed a discretion upon the Court to 'take into consideration such confession as against such other person as well as against the person who makes such confession'" (S. 30). In a previous passage they stated: "We also think that the Sessions Judge erred in omitting to instruct the Jury that as regards each prisoner the confession of his fellow prisoner was at best the evidence of an accomplice."

Dealing with Illustration (*b*) to S. 114 they say: "In view, therefore, of the stringent conditions which the Legislature has here prescribed as essential to the corroborative force of the accomplice's account, we think that the mere confessions of

1. (1874) 21 W. R Cr. 69 (71).

prisoners tried simultaneously with the accused for the same offence, which are in a very qualified manner made operative as evidence by S. 30, do not come within the scope of this legislative declaration, that under the special circumstances mentioned, the account given by one accomplice may be treated as corroboration given by another. And we are, therefore, of opinion that the Judge ought not to have told the Jury that the confessions of prisoners tried with Sadhu were as against him to be rated and valued at best as accomplice's testimony, but further that these confessions were, for the reasons above given, evidence of a peculiarly infirm and defective character requiring specially careful scrutiny before it could be safely relied on."

It is not here necessary to discuss the soundness of the view that there is in illustration (*b*) to S. 114 a legislative declaration as to the necessity of corroborative evidence in order that the evidence of an accomplice may be acted upon, but assuming that under the law, as laid down in the Evidence Act, there is any necessity for the corroboration of an accomplice's evidence in order that such accomplice's evidence may form the basis for a conviction notwithstanding the explicit legislative declaration in S. 133 that an accomplice shall be a competent witness and that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice and admitting, as the learned Judges do in the case under discussion, that the account given by one accomplice may be treated as corroboration of the account given by another, it is unsound as being against all legitimate canons of construction to infer from the illustrations added by the Legislature to a section either a rule of law or a limitation to a supposed rule of law. The scope of an illustration has been the subject of consideration in very many cases. As observed by *Amir Ali* and *Woodroffe* in their book on Evidence: "Illustrations, although attached to, do not, in legal strictness, form part of the Acts, and are not absolutely binding on the Courts. They merely go to show the intention of the framers of the Acts, and in that and other respects they may be useful, provided they are correct. The practice of looking more at the illustrations than at the words of the section of the Act is a mistake. The illustrations are only intended to assist in construing the language of the Act." Illustrations are never allowed to control the plain meaning of the section. Their object is only

to assist in explaining the language of the Section. In this case the section itself (S. 114) relates to presumptions of fact as they are called in English Law. In the English Law certain artificial value is given to a large number of presumptions which are properly presumptions of fact. The object of the framers of the Evidence Act in enacting S. 114 is not to give these presumptions any artificial value, all artificial and technical rules having been carefully avoided in the Act. By enacting S. 114 the Legislature gave the Courts a free discretion to use their own common sense and experience in judging of the effect of particular facts, and of the weight to be attaced to them, and it would be impossible to suppose that they forgot entirely this object and appended the illustrations in the section in order that the object of the section might be frustrated, as it would certainly be if we were to infer from the illustration a presumption to be acted upon rigidly by the Courts. That would be giving an artificial value to matters of fact.

It is, therefore, not correct to say as the learned Judges did in *The Queen* v. *Sadhu Mandal*[1] already referred to, that by reason of S. 114, Illustration (*b*), the account given by one accomplice may be treated as a corroboration of an account given by another only under the special circumstances mentioned in the illustration and not otherwise, and that one of those special circumstances is that the account of the accomplice should be given in the due course of examination as a witness and that the confessions of prisoners tried simultaneously with the accused for the same offence being made operative as evidence only in a qualified manner by S. 30 they do not come within the special circumstances.

We shall now proceed to discuss the cases bearing upon the question of the legal character of the confession made admissible under S. 30. Some of these cases lay stress upon the use of the expression " take into consideration " in S. 30 and infer that this language differentiates the confession under this section from evidence, and that therefore a conviction based on a confession under S. 30 is a case of no evidence and bad in law although such a confession may be, as distinguished from evidence, an element in the consideration of the case—see Proceedings of the Madras High Court dated 24th January 1873[2] ; *Regina* v. *Ambigaru Hulga*[3] ; *Re. Alagappan Bali and others*[4].

1. (1876) 21 W. R. 69 (71) 2. M. H. C. Appendix, page XV.
3. (1876) I. L. R. 1 M. 163.
4. (1887) Weir's Criminal Rulings 4th edition, page 742.

Similarly in *Queen Empress* v. *Khandie*[1] it was observed: "Under S. 30 of the Evidence Act (1 of 1872) these confessions could be 'taken into consideration' as against him; but they are not technically evidence within the definition given in S. 3 of the Act as was pointed out in *Imperatrix* v. *Bayagi*, and they could not therefore alone form the basis of a conviction. They could only be taken into consideration along with evidence." This case was followed in *Queen Empress* v. *Nirmal Dass*[2]. In *Reg.* v. *Kaliappa Gounden*[3] it is said: "Confessions made by accused persons may be considered against persons who are tried with them, but they cannot be accepted as evidence of any fact necessary to constitute the offence." In these observations we take it that the Court was laying down only in other language the principle enunciated in 7 Mad. H. C. App. 15 and followed in *In Re Ambigai Huleyn*[4]. In so far as these decisions lay stress upon the expression "take into consideration" in S. 30 and infer from such language that confession under S. 30 is not evidence, they proceed upon a misapprehension as to the scheme of the Act and they do not also take into account the other sections of the Act already referred to which go to show that the confession referred to under S. 30 is relevant and may therefore be evidence apart from that section. Even taking the language of the section, we have already pointed out the several circumstances which go to shew that the Legislature by using the expression "taking into consideration" in this section does not suggest that the confession is not evidence. It is not necessary to repeat those arguments again. But it may be observed that, so far as we can see, the Full Bench of the Calcutta High Court in *Empress* v. *Ashutosh Chuckerbutty*[5] has made the nearest approach to a correct understanding of the nature and character of this confession, although as to the weight to be attached to such confession where the Court acts upon it, opinion was not unanimous, and the opinion of the majority upon this point might require reconsideration. *Garth* C. J. observed on the point we are now discussing: "I am of opinion that under S. 30 the confession of a prisoner which affects himself and some other prisoner charged with the same offence, becomes, when duly proved,

1. (1890) I. L. R. 15 Bom. 66. 2 (1900) I. L. R. 22 All. 445 at 447.
3. (1883) Weir's Criminal Rulings, 4th edition Vol. II, page.
4. (1876) I. L. R. 1 M. 163. 5. (1878) I. L. R. 4. C. 483.

admissible in evidence as against both prisoners, and must be so dealt with by the Court. When this confession has been duly proved, it may, by the express language of the section, be taken into consideration against either prisoner; and I do not see in what other way it can be taken into consideration than as evidence. There is no provision in the section by which the confession is to be receivable against one prisoner in one way and against the other prisoner in another way. But although the section does, in my opinion, make the confession admissible in evidence against either prisoner, the weight which ought to be attached to such evidence, and the question, whether, taken by itself, it is sufficient in point of law to justify a conviction, is a question for the judge who tries the case." *Ainslie* J:—" The Indian Evidence Act, in the 30th section speaks of certain confessions by a prisoner as proper to be taken into consideration, not only as against the person by whom they are made, but also as against any other person who is being tried jointly for the same offence. Such confessions may legally go to make up the proof of the offence as against the latter, and if so, it is impossible to describe them as anything but evidence. In the case of a confession proved by oral testimony, or previously reduced to writing by a Magistrate and proved by the production of record, the definition of evidence in S. 3 of the Evidence Act will clearly include such proof. There can be no reason for holding that a confession made during a trial in the Court of Session in open Court is to be treated as something different. Therefore I hold that all confessions which can legally be used under S. 30 are evidence."

Similarly *Jackson* J. :—" In my opinion the confession spoken of in S. 30 of the Evidence Act, to put the intention of the legislature into a common English legal phrase 'is evidence'. I also think it evidence for a Jury at a Sessions trial in India, but I think at the same time it is not singly sufficient to support a conviction, that is to say, an accused person other than he who has confessed cannot lawfully be convicted upon such confession alone, nor, in my opinion, ought to be convicted on the ground of such confession corroborated by circumstantial evidence unless the circumstances constituting corroboration would, if believed to exist, themselves support a conviction."

Dealing with the question whether the confession under S. 30 is not evidence against a co-prisoner by reason of the fact that the Legislature has avoided calling it as such he observes: "The Legislature, in my opinion, has not avoided calling the confession of an accused person 'evidence' against a co-prisoner. It has not so called it, because that is not the phraseology of the Act. What its framers appear to have had chiefly in view, and what they have expressed in the way which they considered most suitable, was—1st: What facts are relevant and what irrelevant for the purpose of producing a given belief; and 2nd, in what manner such facts as are relevant are to be proved. The following is the definition or explanation of the expression 'proved': 'A fact is said to be proved when, after considering the circumstances before it, the Court either believes it to exist, etc.' It seems to follow, therefore, that if a relevant fact is proved, and the law expressly authorises its being taken into consideration, *i. e*, considered for a certain purpose or against persons in a certain situation, the fact in question is 'evidence' for that purpose, or against such persons, although the result has not been expressed in those words by the Legislature; and being 'evidence,' it must be used in the same way as everything else that is 'evidence'. What the Legislature intended to denote whenever the word 'evidence' is used in the Act, is carefully explained in the interpretation clause. A confession is an admission, and by S. 21 admissions are relevant. Ordinarily, such admissions can only be proved against the person making them, and, therefore, if the prosecutor at a trial before the Court of Session, proved a confession made by a person then under trial, the Court would be obliged to hold that it was relevant, and could be considered only against the person making it; but the 30th section expressly says that such confession when proved may be considered as against other persons being jointly tried for the same offence who are affected by it. The first point, therefore, seems made out by the terms of the Act itself. In truth it seems impossible to avoid in such cases producing an effect upon the mind, when a confession is read, extending to every person named in the confession; even the Judge with the best balanced mind conceivable, if he spoke with absolute sincerity and self-examination, would probably admit that his mind was in some degree affected by the confession of one man criminating another, provided that he believed the confessing

prisoner to be in the main veracious. It may be, therefore, that the Legislature did wisely in recognizing and taking under its control the impression thus unavoidable, which might actually do more harm if un-recognized. The confession being thus what is called 'evidence' it seems to me, clearly matter for the jury to consider."

The conclusion which the learned Judge has come to in the above passage, viz., that the confession under S. 30 is evidence is correct, and is in harmony with the view which we have previously expressed in this article, although, at the same time, it has to be observed that we cannot accept all the learned Judge's reasoning to be correct. For instance, the learned Judge has remarked that ordinarily an admission can only be proved against the person making it, and that but for S. 30 it cannot be considered as against those not making it. This view is hardly justifiable as we have tried to show already. In our view, but for S. 30 there would have been no difficulty whatever in holding that a confession is relevant even against others.

In a case coming under S. 25 of the Evidence Act a Full Bench of the Bombay Court held in *Imperatrix* v. *Pitamber Jina*[1], that a confession made by one person although it cannot be proved as against the person making it as being one made to a Police Officer may be proved on behalf of the co-accused if it was relevant. The confession in that case was as follows:—"I have killed a man on the Vellard, and the other has run away." The suggestion on the part of the co-accused was that it was an admission of guilt by the accused making the confession and that he himself was not responsible. The High Court held that the learned Judge who tried the case was wrong in shutting out the evidence and should have directed the Jury to take such evidence into consideration as regards such co-accused. The learned Judges observed : "In this case the confession was sought to be proved not as *against* either the confessing person, or his co-accused, but on behalf of the latter. There is not anything, of which we are aware, in the Indian Evidence Act, to which Act alone (S. 2) we are at liberty to look for the law of evidence in this country, that would justify us in excluding such evidence when sought to be given on behalf of the co-accused, provided it

1 (1877) I. L. R. 4 Bom. 261

be relevant." Here the confession is sought to be used in favor of the party not making it, and that, of course, does not come within the purview of S. 30 which applies when such a confession may be taken into consideration as against such person. The confession can only be relevant as suggesting an inference in favor of the party not making it. That only confirms our view that a confession by one accused would be relevant as against another not making it even if S. 30 had not been enacted. But for S. 30 of the Evidence Act, such a confession is relevant as against the party not making it and may be proved as against him in all cases. S. 30 only imposes certain restrictions which would have no application without it but does not declare that the confession is not relevant or is not evidence. Of course it is a different question as to what weight should be given to such pieces of evidence. That has nothing to do with the question of admissibility or with the question of its being evidence under the Act.

Of course where a confession is admissible under S. 30 it should be taken into consideration against all the accused and not simply against the person who made it. If it is not admissible as against the party making it and so cannot be taken into consideration as against him, it is equally inadmissible as against the other co-accused and cannot be taken into consideration as against them. If the prosecution cannot prove the confession as against the accused making the confession, being a confession made to a Police Officer or to a person in authority and made by reason of any inducement, threat or promise made by such person in authority, the prosecution cannot equally prove it as against the other accused jointly tried along with him. See *Empress* v. *Rama Birapa*[1].

It is thus clear that a confession under S. 30 is evidence even as against the other accused whom the confessing person implicates by his confession.

---

1. (1878) I. L. R. 3 B. 12 at page 16.

NOTES OF INDIAN CASES.

Miyaji *alias* **Mahomed Ghouse Sahib** v. **Sheik Ahmed Sahib.**—I L. R. 31 M. 212.—Religious endowments in this country have been suffering from the policy of strict neutrality pursued by Government which makes them fight shy even of legislative measures intended for remedying the notorious mismanagement by the trustees. The strict interpretation placed by the Courts of this country upon many of the sections of the Religious Endowments Act has not been conducive to the improvement of the position. The decision in this case will, we hope, be conducive to better management. Prior to this decision the construction placed upon S. 14 of the Religious Endowments Act was that the Court, though it had the power to remove the trustee for misconduct, had no power to remove him from possession and make provision for better management. It is refreshing to find that the Courts have at last been able to find that they are not so utterly impotent as under the present law it was imagined they were, and we hope that the District Courts will be able to give full effect to this decision in suits under S. 14. Even if no trustee could be appointed in the place of the old trustee removed for misconduct in a suit under S. 14 of the Religious Endowment Act, a position in itself doubtful, and so no possession could be delivered to a trustee to be appointed hereafter, yet an old trustee might be removed from possession and a receiver might be appointed to take charge of the estate until a new trustee is appointed.

Raman Chettiyar *v.* **Gopalachari.**—I. L. R. 31 M. 223.—In the above case the learned Judges hold that the general rule of law requiring a debtor to seek out his creditor and pay him cannot be applied in determining where, for the purpose of S. 17, C. P. C., the cause of action has arisen. The argument relates chiefly to the construction of Clause (iii) of Explanation III to S. 17. The learned Judges practically assume that Clause (ii) has no application to the case, and they construe Clause (iii) as referring not to a *rule of law*, but to the *terms of the contract*, whether *express* or *implied*. The rule of law cannot be read into the contract as an implied term, but the implication, as one of *fact*, may (though the learned Chief Justice desires to leave the question open) be raised either from the nature or terms of the

contract or from the surrounding circumstances, including any custom or course of business between the parties.

We agree that a general rule like the one now in question cannot be relied on as controlling the *express* words of a statute. But unlike Order XI, Rule 1 (*e*) of the English R. S. C., neither Clause (ii) nor Clause (iii) of Explanation III to S. 17 contains the limiting words 'according to the terms thereof,' and in England even this express language has been held to be satisfied if the *implication*, which under the circumstances reasonably arises from the contract, is that it should be performed in England. *Comber* v. *Leyland*[1] referred to by the learned Chief Justice is explained by the Court of Appeal in *Charles Duval & Co. Ltd.* v. *Gans.*[2] In *Comber* v. *Leyland*,[1] the House of Lords proceeded on the view that the contract was by its *express* terms to be performed out of England, *i.e.*, at Pernambuco. Lord *Halsbury*, L. C., no doubt, makes some general observations, but they are justified by the circumstance that Order XI, Rule (1), is an attempt to usurp *international* jurisdiction, and they have no application to the construction of a section that merely relates to the *distribution of inter-municipal jurisdiction*. Lord *Herschell* lays special stress on the provisions of the particular contract. Lord *Morris* gives but a doubtful assent to the decision of the House, and Lord *Shand* not only approves of the decisions of the Court of Appeal in *Bell & Co.* v. *Antwerp, London and Brazil Line*[3], and in *The Eider*,[4] but himself states the principle as follows:—"When it is shown that a plaintiff is entitled to require the performance of a contract in this country, and that consequently a breach takes place in this country, process may be served out of the country.* * * * (but) the rule is limited to this, and there is no right to serve out of the jurisdiction where the performance of the contract may be given either within the jurisdiction or abroad, in the option of the party who has undertaken the obligation."

The general rule as to the debt being payable at the *creditor's place* has been held not to satisfy Order XI, Rule (1) (*e*), because the clause requires that there must be a breach in England of a contract 'which *ought to be performed within the jurisdiction*'; the Courts rightly point out that a payment to be made *wherever the*

1. (1898) A. C. 524.
2. (1904) 2 K. B. 685.
3. (1891) 1 Q. B. 103.
4. (1893) P. 119.

creditor may happen to be or demand cannot be said to be a payment which ought to be made in England—*Bell & Co.* v. *Antwerp, L. and B. Line* [1]. But the language of Clauses (ii) and (iii) of Explanation III to S. 17, C. P. C., is different. The contract is not any the less performable or the money payable at one place—where it can be claimed by law—because the performance or payment could have been claimed at another place also.

It is, therefore, submitted that the English decisions on Order XI, Rule (1) (*e*), are no safe guide in the construction of the 'jurisdiction' sections of the Code of Civil Procedure.

So far as the judgment is based on the language or intention of Explanation III to S. 17—independently of the argument derived from the English cases—the decision is not of much importance as a precedent for the future; for the new Code of 1908 has omitted this Explanation. The question henceforth will be, whether or not, within the meaning of S. 20 (*c*) of the new Code the cause of action arises *wholly or in part* at the place where the money is payable under the general rule of *law* above referred to. We are unable to agree with the learned Judges that any inference may be drawn from the mere *non-mention* of the case in the illustrations to the section—cf. *Laljee Lall* v. *Hardey Narain.*[2] A cause of action arises at the place where payment is to be made or performance to take place—*Lutchmichand* v. *Zorawur Mull,*[3] and the fact that the obligation to perform something at a particular place arises in some measure by a rule of *law* and not by the will of the parties, will not prevent the cause of action accruing at such place.—cf. *Sami Ayyangar* v. *Gopalayyangar.* [4] The decisions on Clause 12 of the Letters Patent will be relevant to the construction of S. 20 (*c*) of the new Code, except in so far as one point of conflict among them has been set at rest by the express reference in the section to the cause of action arising *wholly or in part*, without any question of leave.

In *Motilal* v. *Surajmal*[5], *Tyabji* J. was inclined to hold that the cause of action would arise in part at the place where payment would have to be made under the general rule of law above referred to. And after duly considering Ss. 46, 47, 48, 49 and

1. (1891) L. R 1 Q. B 103.
2. (1882) I. L. R. 9. C. 105.
3. (1860) 8. Moo. I. A. 291.
4. (1873) 7. M. H. C. R. 176.
5. (1904) I. L. R. 30 B. 167.

94 of the Contract Act, the learned Judge affirmed it to be the rule in India as well, that where no specific contract exists as to the place where the payment of the debt is to be made, it is the duty of the debtor to make the payment where the creditor is. On this latter point Justice *Batty* took a different view in *Kedarmal* v. *Surajmal*[1]. He said: "If performance is to be without application and neither day nor place is fixed, S. 49 (of the Contract Act) would apply and exclude plaintiff's contention that the debtor must seek out the creditor and pay at his place of business." We are unable to agree in this view. It is true that in so far as it directs performance at a "reasonable place" to be appointed by the promisee, S. 49 "substitutes a reasonable rule for the common law principle." But this is a *variation* of the English Common Law rule only for those cases in which the promisor chooses to apply to the promisee for such appointment. As pointed out by the Judicial Committee in *Grenon* v. *Lachmi Narain*, [2] under S. 49, "not only has the promisee the right of naming the place, but there is thrown on the promisor the duty of applying to the promisee to appoint a reasonable place." Where the promisor does not so apply, there is nothing in the Contract Act to *exclude* the rule of the common law, and even *Batty* J. does not hold that the provisions of the Act relating to the "place of performance" are exhaustive. The learned Judge proceeds: "The Indian Contract Act makes no provision for the place of performance when no time or place is fixed and when there is no provision to perform without application. But in such case, the ruling in *Bell & Co.* v. *Antwerp, London & Brazil Line*,[3] and not that in *Robey* v. *Snaefell Mining Co* [4] would apply. * * * As plaintiff's case is that S. 49 does not apply, it follows that performance was not promised without application, and therefore *Bell & Co.* v. *Antwerp, L. & B. Line* [3] must govern this case," the result of which was said to be that the Court had no jurisdiction over the case under clause 12 of the Letters Patent. To this conclusion, we venture to take exception. If S. 49 was said not to apply, it did not *follow* that the "performance was not promised without application." It only meant that the promisor had not chosen to apply to the promisee to appoint a place for performance—and this is indeed the case with most promisors

1. (1907) 9. Bom. L. R 903.
2. (1896) I. L. R. 24 C. at p. 18.
3. (1891) L. R 1 Q. B. 103.
4. (1887) L. R. 20 Q. B. D. 152.

against whom a suit becomes necessary at all, for they are not over-anxious to perform. Again, it is true, as was said in *Bell & Co.* v. *Antwerp L. & B. Line* [1], that a creditor may demand payment from his debtor "wherever he may find him." But it does not follow that where the creditor does not so find him and make the demand, the debtor is not bound *in law* to pay at the creditor's place, except in so far as he may avail himself of the privilege which S. 49 gives him. And the conclusion of the English Courts that for the purpose of service *out of England* the contract is not one which *according to the terms thereof ought* to be performed in England does not support the learned Judge's conclusion that even for purposes of clause 12 of the Letters Patent, the *cause of action* does not arise at the creditor's usual residence or place of business For the cause of action to arise at a particular place, it is not necessary that the contract should *by its terms* (whether express or implied) be performable there; for such a view would exclude even Ss. 48 and 49 of the Contract Act.

It is, therefore, submitted that the view of the law taken in *Kedarmal* v. *Surajmal* [2] is erroneous, though the decision itself may be supported with reference to the facts of the particular case, for there the learned Judge held that the contract in question was not in the nature of one between creditor and debtor or vendor and buyer, to which the common law rule will apply, but resembled that in *Comber* v. *Leyland.* [3]

SUMMARY OF ENGLISH CASES.

Lord Chesterfield v. Harris. [1908] 2 Ch. 397.

Right of fishing—Prescription—Profit "a prendre"—Reasonableness.

A right to fish *in alieno solo* without stint and for commercial purposes is a profit *a prendre,* and cannot be acquired by custom. Nor can it be acquired by prescription. A right in an indefinite number of people to take a profit *a prendre* without stint and for sale must tend to the entire destruction of the

1. (1891) L. R. 1 Q. B. 103
2. (1907) 9 Bom. L. R. 903.
3. (1898) L. R. A. C. 524.

property. A prescription, to be good, must be reasonable and certain, and such a prescription would be wholly unreasonable.

[The judgment of *Neville* J. in (1908) 1 Ch. 230 (*vide* 18 M. L. J. 112) reversed.]

Mansell *v.* Valley Printing Company.
[1908] 2 Ch. 441 (C. A.)

Common law right—Unpublished picture.

In this case the Court of Appeal upheld the decision of *Swifen Eady* J. in (1908) 1 Ch. 567 (*vide* 18 M. L. J. 147) that a person publishing a pirated copy of an unpublished picture is liable to damages for the infringement of the common law right of property of the owner in the picture, however innocently he might have acted in the matter.

Great Western Railway Co. *v.* Midland Railway Co.
[1908] 2 Ch. 455.

Railway Company—Compulsory powers for a prescribed period —Expiration of the period—Ordinary powers not affected.

An Act of Parliament authorised a Company to construct a railway, provided that if the railway was not completed within five years from the passing of the Act the powers given to the Company under the Act for making and completing the railway ought to cease. The Company was one incorporated for the purpose of making the railway; and before the expiration of five years, the Company had also lawfully acquired power to use the land on which the line was to be laid.

Held:—That the Company could lawfully complete the line. The Act applied only to such powers as the Company could not have exercised apart from the Act.

Liverpool and North Wales Steamship Co. *v.* Mersey Trading Co. [1908] 2 Ch. 460.

Unauthorised construction of pier—Public nuisance—No right to recover dues paid—Right of property in the owners of the pier.

A Company was authorised by an Act of Parliament to construct a pier, and, on approval of the pier by the Board of Trade, to levy rates from passengers and vessels making use of the pier.

The Company went into liquidation and the pier was assigned to the defendants. A certificate from the Board of Trade not having been got, to make up the defect, the defendants acquired a grant of the shore and the bed of the sea on which the pier stood, from the Crown. In an action by the plaintiffs (a Steam-ship Company) for an injunction to restrain the defendants from excluding them from the pier and also for repayment of the rates paid under protest:

Held: *First*—the pier, being an unauthorised structure, was an obstruction to navigation and a public nuisance, and consequently no statutory rights could arise either in favour of the defendants or the public: *Secondly*—the plaintiffs could not, as individual members of the public, elect at their option to treat the pier either as a nuisance or as an authorised structure: *Thirdly*—the pier, though a nuisance, was still the property of the defendants and they had, therefore, the right to exclude the plaintiffs from using it: *Lastly*, though the defendants could not recover anything for the use of that which, in the eye of the law, was a public nuisance, the plaintiffs could not recover the amount paid by them under protest, having received consideration therefor, *viz.*, the use of the pier.

Butterley Co. Ld. *v.* New Hucknall Colliery Co. Ld.

[1908] 2 Ch. 475.

Mines—Overlying and underlying seams—Lessee's right of support.

The lessors have no right to withdraw support from the lessee's seam of coal by removing underlying seams of coal.

Poulton *v.* Adjustable Cover and Boiler Stock Co.

[1908] 2 Ch. 430 (C. A.)

Patent—Action for infringement—Judgment—Revocation pending inquiry—Estoppel.

A patentee brought an action for infringement of patent. Defendants objected, but their objections were overruled, and the plaintiff got an order for inquiry as to damages. Pending the inquiry, the defendants got a revocation of the patent on the very

grounds urged in the action:—*Held*: The defendants were estopped by the judgment against them from raising objections to the validity of the patent, and the plaintiff was entitled to substantial damages notwithstanding the revocation of the patent.

Hyams v. Stuart King. [1908] 2 K. B. 696 (C. A.)

Gaming debts—Forbearance to sue and forbearance to publish default—Whether good consideration for a cheque.

The Court of Appeal (*F. Moulton* L. J dissenting) *held* :—"While plaintiff cannot sue for the recovery of money won by him by betting, nor on a bond, bill, note or cheque given to pay the money lost, he can sue upon a new contract, not tainted with illegality and made for a good consideration, *viz.*, that * * * the plaintiff would give the defendants a reasonable time within which to pay the amount which the defendants ought to have paid (earlier) and would forbear to declare them defaulters—an amount which both parties considered was due to the plaintiff in honour, though not by law."

Per *Fletcher Moulton* L. J.—" The above is no good consideration. Such a contract is only "colorable, and the real intention of the parties was that the bet should be paid." It is unenforceable, being equal to a black-mail."

Dewhurst v. Mather. [1908] 2 K. B. 754 (C.A.)

Employer and workman—Workmen's Compensation Act—Periodical and regular employment, though only once a week, not casual.

A workman who, though engaged only once a week, is employed regularly, and whose employment for that period can be termed stable, is entitled to compensation under the Act (Workmen's Compensation Act), the engagement not being 'casual' within the meaning of the Act.

Fitzgerald v. W. G. Clarke & Son.
[1908] 2 K. B. 796 (C. A.)

Workmen's Compensation Act—Injury arising "out of" and "in the course of" the employment—Meaning of.

Where an accident happens to a workman, while engaged at his work, through the tortious act of a fellow-workman (here a practical joke resulting in an injury to the applicant's thigh)

which has no relation to their employment, the accident does not arise *out of* the employment within the meaning of the Act, though it arises *in the course of* the employment. The words "out of" and "in the course of" employment are used conjunctively and not disjunctively. "Out of" does not mean "in the course of," but it means "due" or arising from such causes as the negligence of fellow-workmen in the course of employment or some natural (or common) cause incidental to the character of the business."

[*Armitage v. Lancashire and Yorkshire Ry. Co.*,[1] followed.]

Jackson v. Jackson. [1908] P. 308.

Petition for nullity of marriage owing to respondent's insanity — When grantable—Costs.

On a petition for nullity of marriage on the ground of insanity of the respondent, "the question is not whether he was aware that he was going through the ceremony of marriage, but whether he was capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject." "In the older reported cases, the Court has hardly ever granted a decree where the evidence of the medical witnesses has proved or suggested that the particular form of insanity might be of sudden occurrence. The cases where the Court has found incapacity to contract are where the unsoundness of mind has been of progressive growth." It is necessary to "ascertain and determine whether the respondent's insanity can be traced back to an early period to an extent which substantially will justify one in coming to a conclusion that it existed before as well as after the marriage contract was entered into." Costs of the officer of the Court who represented the respondent as his guardian *ad litem* ought to be paid for by the petitioner, though the petitioner will, in case of success, be entitled to recover the same from the respondent.

The "Bruxellesville." [1908] P. 312.

Collision—Serious damage to ship with cargo—Insufficient repair thereafter—Foundering of ship on continuance of voyage—Whether natural and reasonable result of collision.

1. (1902) 2 K. B. 178 (C. A.).

Plaintiff's ship laden with cargo was seriously damaged by ship collision with the defendant's, which was due to the defendant's negligence, and went to repair the same in a repairing dock during the course of the voyage. When she continued the journey after the repair she foundered before reaching the destination, as a result of insufficient repair:

Held, that the foundering was not the "natural and reasonable result" of the collision and that the defendant was not liable for the sinking.

In Re **Henson—Chester** *v.* **Henson.** [1908] 2 Ch 356.

Devise of real estate charged with debts and legacies—Executor, beneficiary as well—Purchaser not bound to see to the application of the purchase-money.

When real estate is charged generally with debts and legacies and devised beneficially to a devisee who is also appointed an executor, the purchaser from him is not bound to see to the application of the purchase-money. It does not matter that at the time of the purchase, to the knowledge of the purchaser, all the debts have been paid and only legacies remain to be paid. The convenience of mankind requires that it should be so unless it can be shown that the purchaser knew that the purchase-money was not going to be properly applied and that he was ancillary to something akin to a fraud. This result will follow even where the executor does not purport to act as such "for where a person who fills the position of an executor is found selling or mortgaging part of his testator's estate, he is presumed to be acting in the discharge of the duties imposed upon him as an executor unless there is something in the transactions which shows the contrary."

In Re **Brewster—Butler** *v.* **Southhans.** [1908] 2 Ch. 365.

Will—Construction—Debts — Death duty "deemed to be a debt" by Victorian law, if included.

The testatrix in the case was a lady of English domicile. She made a will giving her residuary property to certain persons as trustees upon trust to sell and to pay her debts. The question was whether the word "debts" included death duty on certain Melbourne property belonging to her for which she had appointed separate trustees to sell and remit the proceeds to her English

trustees to be held upon certain specific trusts. Under the local Victoria Law, death duty was deemed to be a debt. *Held*; the word "debts" did not, upon the proper construction of the will, include death duty.

Wilson v. Harper. [1908] 2 Ch. 370.

Principal and Agent—Duty to allow commission even after death of Agent.

The death of an agent does not put an end to the liability of the principals to allow commission in respect of business from firms introduced by the agent before his death where under the agreement by which he was appointed agent he was so entitled.

Elliston v. Reacher. [1908] 2 Ch. 37.

Restrictive covenants—Purchasers from a common vendor in pursuance of a building scheme—Injunction—Substantial damage, if necessary.

Parker J. thus sums up the conditions necessary to enable a purchaser of a lot in pursuance of a building scheme to enforce restrictive covenants against another purchaser irrespective of the dates of the purchases.

(1) A common vendor. (2) Before selling, the vendor must have laid out his estate or a definite portion thereof including the lands of which the contending parties are the purchasers for sale in lots subject to restrictions intended to be imposed on all the lots and which, though varying in details as to particular lots, are consistent, and consistent only with a general scheme of development. (3) The restrictions must have been intended by the vendor to enure for the benefit of all the lots and the restrictions must also be as a matter of fact for the benefit of all the lots. (4) The purchases must have been made on the footing that the restrictions were to enure for the benefit of the other lots included in the scheme. The right to enforce these restrictions do not rest upon any implication of mutual covenants. The community of interest imports in equity a reciprocity of obligations which each purchaser contemplates when he purchases.

The action was to restrain the defendants from using certain building as a hotel contrary to the restrictive covenants entered into with the common vendor of the plaintiffs and the defendants.

The vendors had reserved to themselves the right to dispense with these restrictions. An injunction was nevertheless granted. His Lordship held that though, as a rule, the Court will more readily award damages instead of an injunction where the plaintiff's right is only equitable as in the case of restrictive covenants, still the absence of substantial damage was not by itself sufficient to warrant that course being adopted, and that in this case, having regard to the fact that if the injunction were refused, the plaintiff could not thereafter prevent any user by anybody contrary to the covenants, injunction was the proper relief.

JOTTINGS AND CUTTINGS.

School Authorities.—Legal Power or Practical Wisdom.—The *Central Law Journal* reports an interesting judgment of the Supreme Court of Wisconsin in an action of mandamus commenced by the relator against the principal of a High School to compel the re-instatement of two of the relator's children who had been suspended by the principal for having arranged for the publiction in a local newspaper of a poem written by a student of a senior class, the poem 'being a take-off on the rules of the school.'

The Court said: We are not called upon to approve the practical wisdom displayed by the school authorities in dealing with the hasty conduct of thoughtless school children, prompted by an older mate and abetted by the publisher of the paper, or to justify the strong resentment that must have prompted the relator in appealing to the Courts for redress. The exercise of a little chairty, forbearance, and good nature might have avoided the controversy which must have been attended with more or less serious consequence to the suspended pupils as well as to the school and to the litigants here represented. But the cause is before us for decision, and must be treated like any other law suit. The authority to suspend the pupils from the privileges of the school is denied by the appellant unless the offence was a violation of some rule prescribed by the board, or involved moral turpitude, or was committed during school hours in the school room, or in presence of the master and other pupils.

In *State exrel Burpee* v. *Burton*[1] it is said 'the principal or teacher for the time being is *in loco parentis* to his

1. 45 Wis. 150 ; 30 Am. Rep. 706

pupils and because of that relation he must necessrily exercise authority over them in many things concerning which the board may have remained silent. In the school, as in the family, there exist on the part of the pupils the obligations of obedience to lawful commands, subordination, civil deportment, respect for the rights of other pupils, and fidelity to duty. These obligations are inherent in any proper school system, and constitute, so to speak, the common law of the school. Every pupil is presumed to know this law, and is subject to it whether it has or has not been re-enacted by the district board in the form of written rules and regulations. Indeed it would seem impossible to frame rules which would cover all cases of insubordination and all acts of vicious tendency which the teacher is liable to encounter daily and hourly.' We have been referred to no decision directly holding that the school authorities can suspend a pupil for misconduct after school hours, unless the offence is a violation of established rules, or is committed in the school house, or upon the school grounds, or in the presence of the master and other pupils. There is abundant authority, however, that the school board or the teacher may make rules to govern the conduct of the pupils after school hours, and punish a violation thereof by suspension from attendance upon school.

It is clear, therefore, that a rule might have been adopted by the school authorities to meet the situation here presented. This Court, in the quotation already made from the opinion in the *Burpee case* recognizes certain obligations on the part of the pupil, which are inherent in any proper school system, and which constitute the common law of the school and which may be enforced without the adoption in advance of any rules upon the subject. Hhis Court therefore holds that the school authorities have the power to suspend a pupil for an offence committed outside of school hours, and not in the presence of the teacher which has a direct and immediate tendency to influence the conduct of other pupils while in the school room, to set at naught the proper discipline of the school, to impair the authoritiy of the teachers, and to bring them into ridicule and contempt. Such power is essential to the preservation of order, decency, decorum and good government in the public schools.

The school authorities must necessarily be invested with a

broad discretion in the government and discipline of pupils, and the Courts should not interfere with the exercise of such authority unless it has been illegaly or unreasonably exercised.

This Court is not called upon to decide as to the wisdom of the action of the school authorities but only as to their jurisdiction within proper limits."—*Central Law Journal.*

***

Some Modern Tendencies : *How the Common Law grows.*—And the common law grows not merely by following and enlarging the scope of previous decisions, but by boldly overruling them at times. Well do I remember rising to argue one of my first cases. I had the confidence—that sublime confidence that one feels when he is able to cite a case exactly in point. The supreme moment at last arrived, and with much ostentation the case was cited. To my horror the Judge received it very coldly observing : "That case has been overruled." "No my Lord," I continued, "I have gone very carefully through the reports and it has never been overruled." "Well," said the Judge, "if it hasn't been, it will be, for I'll overrule it." Now for my last hope. "But, my Lord, it happens to be one of your Lordship's own judgments." "Ah," said he, "I am glad of that. I'll have the less hesitation in overruling it," which he promptly did. And so the common law grows by interpretation, by extension of principles, by overruling, and by the much more refined art of distinguishing.

Is not the too copious citation of cases a growing weakness of modern advocacy? In briefs and in oral arguments the multitude of cases referred to is becoming appalling. It is a poor proposition indeed that you cannot support by some cases. That there should be conflicting authority is inevitable, considering the number of tribunals whose decisions are quoted. We are happy, indeed, when we have authority clearly in point, and I must not be understood as objecting to the proper use of authorities. Perhaps at your bar you have not had occasion to complain of it, but the multiplication of citations, in many of which the analogy to the case in hand is very faint, if not quite illusory, imposes unnecessary labor on the Bench and tends to obfuscate rather than

to elucidate. I am a believer in codification, but if this be not obtainable, forgive me if I indulge my civil law prejudices and say a word in favor of the deeper study of abstract principles. A young barrister visited the Supreme Court of the United States, and he told me he left it with some things to think over. Counsel for appellant cited and discussed a score or more of cases. Mr. Evarts, for respondent, spoke but half an hour and did not quote a single case, prefacing his argument by the statement that the case was one that could be dealt with upon principle. It is of course true, as we often hear, that law is not an exact science.

With reference to statutory law the counsel's course is clear. The law, be it right or wrong, must be given its natural effect, and it is not in this class of case that we are likely to be troubled with over-citation. It is rather in the intricate and complex commercial cases arising from the incessant movement and modifications in the methods of doing business, and I suggest the inquiry whether in these we might not gain something by relying more upon fundamental principle and less upon the plethora of reported cases. The great body of general principles which have become so firmly fixed in the common law as to be no longer open to challenge, will not be found to differ materially from the principles of the civil law, and are in general in harmony with reason and justice, and the study of them will give clearness to the vision and vigour to the mind.

Is not the lawyer becoming too much the business manager of his clients' affairs? Are not aggressiveness, adroitness, and commercial acumen, coming to be regarded as the major qualifications, and legal scholarship as one of the minor qualifications for success at the bar? I must not try to establish a presumption in favor of mediocrity, but do we not usually find truth somewhere in the middle way? The merely practical lawyer who does not concern himself about the reason of things can never be called a jurist; he is generally inaccurate, and when confronted by novel conditions he can only deal with them as an empiric. The merely theoretical lawyer becomes visionary. By all means let us have men of action; let us know how to apply our principles; but in a utilitarian age, let us not forget that, as in some other sciences, so in law, we may gain light and strength and inspiration from the study of truth in abstract—under the pure light of heaven, un-

tinged by the changeful hues of conflicting human interests and undimmed by the shadows of human fault and frailty. .

***

More Lawyers than Dogs.—A young man left home for one of the law-schools of Hungary filled with high hopes of returning ere long bearing the coveted dog skin—the diplomas being all written on dog skin. He diligently kept all the terms and followed the course until he graduated with distinction. But he returned home without the coveted diploma. His family and friends gathered around him and said : "It is all very well for you to say that you passed with honors. If you did, where is the diploma ?" The only excuse the young man had to offer was that "there were more lawyers than there were dogs in Hungary."

Every year brings its new influx of aspiring barristers, each requiring a new constituency. Is there not at least some temptation to sink into the arts of competition, and do we not hear discussions of the question how far a lawyer may advertise ? I repeat what I said a moment ago that I believe it right that a lawyer should make money, and I think the lawyer receives less monetary reward for his labor than any class save the clergy, but when young men come to the profession of law with the primary and dominating purpose of making money, the knell will be sounded of those honourable traditions which to this day give us a right to the respect and confidence of our fellow men. If money be your object in life, do not commit the supreme folly of coming to the bar. You will find far more of it in railways and banks, and ware-houses and factories. Law is not a money making business. The ambition for wealth is omitted from the lawyer's oath of office. He consecrates himself to other and higher purposes. I am quite well aware that anything that might be said of the distinction between trades and professions would be regarded by many as irritating twaddle. As a basis of class distinctions there has been very much that is irritating. The strong men of commerce upon whose sagacity, enterprise and capital so much depends for the material development of a country, command our respect and admiration, and perhaps—too often—our envy. We must not assert a vaunting claim to superiority, but we ought to remember that there is something distinctive of the professions. Your clergyman ministers to your spiritual nature and your respect for him is not guaged by the amount of

his stipend. Your physician's skill is engaged for the lives and health of your loved ones. The world's criteria of values yield before the great experience of life. Sit by the bed side of your only child when the grey dawn begins to reveal again the pallor of the sunken cheeks, and you will think less of the rise and fall of stocks; nor will you compare your devoted doctor with your excellent broker. You will simply say the two are quite different and the one is not measured by any standards that are known on the exchange. So must we pause to remember in the hurry scurry of routine, that as lawyers we are not dealing with pig iron and molasses, but with eternal principles of morals and justice, upon the application of which depends not only the security of life, property and reputation, but even of liberty itself. Our constitutions and our laws may decree liberty, but it is only in the working out of these laws that we shall enjoy liberty, and that wrong and oppression shall cease. Let us remove not the ancient land marks. Let us not lower the standards that concern the honor of profession. Change must needs come in the methods and the etiquette of the profession, but let us not suffer these changes to obscure that, which for the true lawyer must always be above money making, and above fame, the fact that his sacred obligation and his highest privilege is to assist in the administration of pure justice. Changes will come in the administration of justice too, and the duty of the bar will always be to see to it, by all that we hold worthy of respect and preservation, that whatever these changes may be, they shall never be suffered to corrupt its cardinal motive or to pervert its essential truth.

***

A Lawyer's Luck.—A North Carolina lawyer says that when Judge Buxton of that State, made his first appearance at the bar as a young lawyer, he was given charge by the State's solicitor, of the prosecution of a man charged with some misdemeanour.

It soon appeared that there was no evidence against the man, but Buxton did his best, and was astonished when the Jury brought in a verdict of "guilty."

After the trial one of the jurors tapped the young attorney on the shoulder. "Buxton" said he, "we didn't think the feller was guilty but at the same time didn't like to discourage a young lawyer by acquitting him."—*Lippingcotts.*

***

Not for the Court to decide.—The Judge decided that certain evidence was inadmissible. The attorney took strong exception to the ruling and insisted that it was admissible. "I know your honor," said he warmly, "that it is proper evidence. Here I have been practising at the bar for forty years, and now I want to know if I am a fool." "That" quietly replied the Court "is a question of fact and not of law, so I won't pass any opinions upon it, but will let the jury decide."—*Stray Stories.*

***

In a French Court.—Counsel (*addressing the judge after he had got his client, a thief, acquitted in the face of strong evidence*:—

"Your honor, I would be obliged if you would order that this man be not released from custody until to-morrow."

Judge: "Certainly; but what is your reason?

"Well, you see, the road near my home is rather lonely, and as my client knows quite well that I shall have money on me he might possibly lie in wait for me."—*Bon Vivant.*

***

Lord Erskine.—An American Senator wrote to Lord Erskine that he had made a wager that most of his (Erskine's) decrees had been reversed. The greatest of English advocates replied—"To save you from spending your money upon bets you are sure to lose, that no man can be a great advocate who is no lawyer.—The thing is impossible."

***

Leading Counsel.—In the Courts of Common Law the King's Counsel are not attached to any Court, but go into any Court for which they are briefed. There are advantages as well as disadvantages in the practice. It has led to popular Counsel being briefed in more cases than they can possibly attend to. In the Chancery Division of the High Court of Justice a King's Counsel attaches himself to a particular Judge and does not practise before any other Chancery Judge of First Instance unless he is paid a special fee of fifty guineas (in addition to his ordinary brief fees). At present there are six Chancery Courts of First Instance, and to each of these Courts certain leaders attach themselves. Solicitors are thus assured that the Counsel whom

they have briefed will be present to argue their case—a certainty which tney can never enjoy in briefing leading King's Counsel at the Common Law Bar. The first Counsel of emmence who appears to have thus restricted his practice to one Court of Chancery was Lancelot Shadwell. The words in which he laid down his own view of the duties of an advocate are worthy of being quoted *in extenso*:—

"I cannot induce myself to think that it is consistent with justice, much less with honor, to undertake to lead a cause, and either foresake it altogether, or give it an imperfect, hasty and divided attention—consequences that inevitably result from the attempt to conduct causes before two Judges sitting at the same time in different places. I have therefore resolved to refuse any business which may tend to prevent me from giving my undivided attention in Court to matters that may be heard before the Lord Chancellor."

***

Sir Richard Bethell and Vice Chancellor Shadwell.—In 1841 Bethell took silk and he became the lawyer in the Court of Vice-Chancellor Shadwell. The influence which he exercised over the Vice-Chancellor was distinctly prejudicial to the cause of justice. True words are often spoken in jest. "Why" asked the jester of those days, "is Vice-Chancellor Shadwell like Rehoboam?" "Because he sets up an idol in Bethel."

***

The Lawyer's Duty.—A lawyer as an officer of Courts of Justice, is bound to aid in securing just decisions. He has no moral right to assist in securing unjust ones. Baron Bramwell once said, to be sure ;

"A man's rights are to be determined by the Court; not by his attorney or counsel. It is for the want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel: 'I want your advocacy, not your judgment ; I prefer that of the Court.'"

Chief Justice Cockburn once remarked: "My noble and learned friend, Lord Brougham, said that an advocate should be fearless in carrying out the interests of his client ; but I couple that with this qualification and this restriction, that the arms

which he wields are to be the arms of the warrior and not of the assassin. It is his duty to accomplish the interests of his client *per fas* and not *per ne fas.*"

Another way of stating the matter is found in Hoffman's 14th resolution in regard to professional deportment, where he says :

" My clients' conscience and my own are distinct entities ; and though my vocation may sometimes justify my maintaining as facts or principles, in doubtful cases, what may be neither one nor the other, I shall ever claim the privilege of solely judging to what extent to go. In civil cases, if I am satisfied from the evidence that the fact is against my client, he must excuse me if I do not see as he does, and do not press it ; and should the principle also be wholly at variance with sound law, it would be dishonourable folly in me to endeavor to incorporate it into the jurisprudence of the country, when, if successful, it would be a gangrene that might bring death to my cause of the succeeding day."

Sections 50 *and* 51 *of the Alabama Code* :—*Lawyer's Fees.*—

" 50.In fixing fees the following elements should be considered: *First*—The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to properly conduct the cause. *Second.*—Whether the particular case will debar the attorney's appearence for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that the attorney would otherwise be employed ; and herein of the loss of other business while employed in the particular case, and the antagonism with other clients growing out of the employment. *Third.*—The customary charges of the bar for similar services. *Fourth.*—The real amount involved, and the benefits resulting from the services. *Fifth.*—Whether the compensation be contingent or assured *Sixth.*—Is the client a regular one, retaining the attorney in all his busines ? No one of these considerations is in itself controlling. They are mere guides in ascertaining what the service was really worth ; and in fixing the amount, it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade.

"51. Contingent fees may be contracted for; but they lead to many abuses, and certain compensation is to be preferred."—*Section* 48 *of the Alabama code*, viz:—

"48. Men, as a rule, over-estimate rather than undervalue the worth of their services, and attorneys in fixing their fees should avoid charges which unduly magnify the value of their advice and services, as well as those which practically belittle them. A client's ability to pay can never justify a charge for more than the service is worth; though his poverty may require a less charge in many instances sometimes none at all."

"If possible, do not receive any compensation in your client's business, except from your client himself; but if circumstances compel you to break the rule, tell your client what you receive."—*The Green Bag*, Vol. XX.

Sober as the Judge.—Judge Boyd of the Irish Bench kept a supply of his favourite "pizen" on the desk before him in an ink-stand of peculiar make. When he wanted a sip he took it through a quill pen, while Counsel professed entire ignorance of the little manœuvre.

"Tell the Court truly" he once said to a witness, "were you drunk or sober?"

"Quite sober, my lord" replied the man. And his Counsel added, with a look at the inkpot: "As sober as a Judge".—*Pall Mall Gazette.—The Green Bag*, Vol. XX.

Satisfaction.—Cross examining a witness Counsel asked

"When you said you were 'satisfied' just now, you meant, I suppose, that you were *content*?"

"I did not."

"Well, satisfied and content are just the same, are they not?"

"They are not."

"Well, suppose you explain to the Court and Jury what the difference is."

"Sure, I will. Now, for instance, I might be *satisfied* that it was you I saw out behind the barn kissing my wife, Nora, but I'd be far from being *content*."—*The Green Bag*, Vol. XX.

Should Trial by Jury be Abolished?—The trial by jury in England was not inaugurated for the purpose of changing, avoiding, or detracting from the law justly and impartially

administered, but for the purpose of preventing persecution, without law, by the sovereign, the peers, and the King's officers. It was intended as relief against oppression, not as an excuse for actual crime; the outgrowth of lawful defence against the whims and animus of individuals, not as the license to emotional sympathy for a red-handed murderer, or a sneaking thief. The system of common law grew up in opposition to crown prosecutions and tyrannies.

At first a Jury as Officers of the Court, travelled with the Judge to the various "assizes"—subsequently this was changed so as to select " a Jury of the vicinage".

None of these reasons apply to this country, for there never has been, during the life of the Republic, any sovereign or peer, or ruling class, having the desire to oppress individuals among the people, without law, and none with power to do so, if they had had the desire, because, at the expense of repetition, our law exactly defines every crime, and affixes its punishment.

They were permitting the driving of the entering wedge that would confuse, weaken and ultimately destroy the law itself.

Thirty-five years' practice at the bar convinces me that Juries are slowly, but surely, losing respect for State Courts as well as the law, and are becoming more and more aggressive in placing their own interpretation on the law, and less and less attentive to the rulings of the Court, as well as the charge of the trial Judge, defining the law of the case.

I state my objections to trial by Jury as follows :—*In Criminal Cases.*

First.—They do not apply the exact definitions of crimes given in charge by the Court because: (1) they do not understand them, for it requires a student of the law itself to do so; (2) They do not care to understand them, because the conduct of the trial convinces them they are supreme, and have the right to consult their own whims, instead of such definitions.

Second.—They read into the law their own emotions, sympathies and feelings, giving it: (1) their own interpretation which will " neither excuse nor justify " the crime from a legal point of view; (2) "putting themselves in the place of the defendant" a position never contemplated by either the law or good morals.

Third.—Sometimes (though this is extraordinarily seldom) they are corrupted either through fear or worse motives, and return a verdict in defiance of the law.

Fourth.—Their verdicts are often rendered upon prejudice, though they may not be conscious of it at the time; for instance, the "reasonable doubt" is nearly always disregarded where a tramp or pauper is defendant, and they put on him the burden of proving his innocence; whereas as against a well-to-do citzen, tried on practically the same charge, the "reasonable doubt" is stretched into most unreasonable excuses for acquittal.

The defendant's attorneys will make statements and arguments, appealing to the passions and prejudices of jurors to directly violate their oaths and acquit the defendant, which they would not dare to make to the trial Judge.

As the law applied to crime is an exact science intended to prevent crime by fairly, justly and reasonably punishing those guilty of its infraction, there can be no reason for a Jury on the theory that they will be more merciful than the Judges learned in the law and capable of deliberately and judiciously analysing, weighing and applying all the facts.

Knowing they will be tried, not under the law and facts, but upon the emotions and sympathies of the Jury, which the law itself would not permit, murderers and perpetrators of other crimes are encouraged and the spirit of anarchy is inculcated. Imagine those guilty of violence, intimidation, and destruction of property during "strikes" being tried according to the letter and spirit of the law.

Juries are continually adding to the definitions and destroying the certainty of punishment. The eloquent attorney who proclaims that "there is a higher law" is but inviting the Jury to do something which the Judge rarely ever does—violate their oaths of office. It is the uncertainty of a Jury verdict that breeds criminal desire and anarchy.—*American Law Review*, Vol. XLII.

REVIEWS.

The Principles of the Law of Interest in British India: By Edmund Upton of the Middle Temple, Barrister-at-law: Published by Thacker Spink & Co., Calcutta, Price Rs. 6.—The law of

interest is a subject upon which there has been no previous text-book, and we must, therefore, appreciate the great difficulty which Mr. Upton must have experienced in his labors. Unfortunately there are no contents for the book. But this inconvenience is obviated to some extent by the preface in which the author mentions what he deals with in the various chapters of his book. The author divides the book into ten chapters. The first three chapters deal with the historical sketch as to the law of usury; the fourth deals with common law rules as to interest; the fifth to eighth with the two forms of interest, *viz.*, interest payable as debt and interest payable as damages; the ninth deals with the question of undue influence, and the tenth and the last deals with the question of penalty. The author has referred to both English and Indian cases. The book is bound to be useful as bringing into one short compass the various decisions on the subject of interest which have been more capricious and conflicting in this department of law than in any other. The Acts and the various sections dealing with the question of interest have been referred to in their proper places. There is one question which has not been dealt with in the book which we hope will be dealt with by the author in his second edition, *viz.*, the question as to the cessation or otherwise of interest where there is no legal representative of the creditor to receive the debt, the debtor being ready and willing to pay. It cannot be said that there is a paucity authority upon the point, but there are a few decisions bearing upon the question. See *Garuda Reddi* v. *Gudi Janakayya Garu*;[1] *Haji Abdul Rahiman* v. *Haji Noor Mahomed*;[2] *Harendra Lal Rai Chowdri* v. *Maharani Dasi.*[3]

A Lawyer's Manual of Book-keeping: By Hughes Onslow: 2nd Edition: Price 10s. Published by Butterworth & Co., London.—Although the system of account-keeping in India and among lawyers here is very different from the English system of book-keeping yet Indian lawyers will do well to see how accounts are being kept by lawyers in England. The Vakils in this country occupy a double role. They are both Solicitors and Counsel combined and in their former capacity, it will be useful for them to know how Solicitors keep their accounts and the general principles

1. (1862) 1. M. H. C. 124.
2. (1891) 16 B. 141.
3. (1901) 28 C. 557.

on which account-keeping proceeds in England. The system of double entry which is so familiar in England is quite foreign to Indian people here, but with this difference the other principles of account-keeping ought to be of use.

Desai's Index of Cases Judicially noticed (1811—1907) 2nd. Edition. Price Rs. 9.—We congratulate Mr. Desai upon his having brought out a second Edition of this book within the short space of 3½ years. In books such as these accuracy and an exhaustive yet discriminate reference form the sole merit, and the method by which it is done is comparatively a small matter provided the object in view, *viz.*, of facilitating the work of the practitioner, is attained. A book such as this is a desideratum for the practitioner. The author has made considerable improvements, and we hope the present edition will be as useful and popular as the first.

Acknowledgments.

We beg to acknowledge receipt of the following publications.—

The Principles of the Law of Interest in British India. By Edmund Upton of the Middle Temple, Barrister-at-Law. Published by Thacker Spink & Co., Calcutta. Price Rs. 6.

A Lawyer's Manual of Book-keeping: By Hughes Onslow: 2nd Edition. Published by Butterworth & Co., London Price 10 s.

Desai's Index of Cases Judicially Noticed (1811-1907): 2nd Edition. Price Rs. 9.

The New Code of Civil Procedure: By K. Ramachandra Iyer. B.A., B.L., High Court, Vakil, Published by S. Murthy & Co., Madras. Price Re. 1-.

The New Code of Civil Procedure: By A. M. Ishanulla Abbasi, Late Secretary, Bar Association, Gorakhpur. Price Rs 10.

Colonial Law, Vol. II: By Burge.

The Indian Evidence Act: By Cunningham and Shephard: 11th Edition. Published by Higginbotham & Co. Price Rs. 12.

The Indian Practice: By M. L. Agarwala: Vol. I.

Allahabad Law Journal for	October 1908.
Bombay Law Reporter	Do.
Burma Law Reporter	Do.
Calcutta Law Journal	Do.
Calcutta Weekly Notes	Do.
Canada Law Journal	Do.
Canada Law Times	Do.
Central Law Journal	Do.
Chicago Legal News	Do.
Criminal Law Journal	Do.
Hindustan Review	Do.
Kathiawar Law Reports	Do.
Law Students' Helper	Do.
Law Students' Journal	Do.
Punjab Law Reporter	Do.
The Law Journal	Do.
The Lawyer	Do.